October 10, 2024

Via Electronic Mail

James P. Sheesley
Assistant Executive Secretary
Attention: Comments—RIN 3064-AF88
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429

Re: Parent Companies of Industrial Banks and Industrial Loan Companies (RIN 3064-AF88)

Dear Mr. Sheesley,

The Bank Policy Institute[1] is writing in response to the Federal Deposit Insurance Corporation's notice of proposed rulemaking to amend its regulations governing the parent companies of industrial banks and industrial loan companies.[2] The FDIC's existing regulations were adopted in December 2020 and require certain conditions and written commitments in situations where an ILC would become a subsidiary of a company not subject to consolidated supervision by the Federal Reserve Board.[3] We previously supported that effort and also recommended that the FDIC implement more robust and comprehensive requirements for ILCs and their parent companies.[4]

ILCs offer banking products and services functionally indistinguishable from those other banks provide. However, the parents of ILCs are exempt from the requirements of the Bank Holding Company

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations and represents the financial services industry with respect to cybersecurity, fraud and other information security issues.

[2] FDIC, Parent Companies of Industrial Banks and Industrial Loan Companies, 89 Fed. Reg. 65,556 (Aug. 12, 2024), https://www.federalregister.gov/documents/2024/08/12/2024-17637/parent-companies-of-industrial-banks-and-industrial-loan-companies#page-65556.

[3] FDIC, *FDIC Approves Rule to Ensure Safety and Soundness of Industrial Banks* (Dec. 15, 2020), https://www.fdic.gov/news/press-releases/2020/pr20137.html; *see also* 12 C.F.R. Part 354.

[4] BPI, *Comment on Parent Companies of Industrial Banks and Industrial Loan Companies (Docket ID RIN 3064-AF31)* (June 30, 2020), https://bpi.com/bpi-comment-letter-argues-ilcs-should-meet-the-same-supervisory-and-regulatory-standards-applied-to-banks/ https://bpi.com/bpi-comment-letter-argues-ilcs-should-meet-the-same-supervisory-and-regulatory-standards-applied-to-banks/. Attached as Appendix A.

Act.[5] As a direct result, they can avoid regulation and supervision by the Board of Governors of the Federal Reserve System and need not confine their activities to those "closely related to banking."[6]

The BHCA's requirements are designed to ensure the safety and soundness of a particular banking organization and to maintain the separation of banking and commerce in the United States more generally. However, in the relatively recent past, commercial firms and tech companies like Wal-Mart, Home Depot, and Rakuten have sought to access the benefits offered through FDIC insurance and access to the federal safety net by the establishment or acquisition of an ILC. These firms are subject to market and other incentives that are distinct from, and may be in conflict with, serving as a source of financial strength for a subsidiary bank. Moreover, ILC parent companies are *not* subject to the same robust supervision and regulation as parent bank holding companies. For these reasons, the FDIC issued the existing regulation in 2020 establishing its authority to require ILC holding companies to agree to certain conditions and enter certain written commitments when an ILC would become a subsidiary of a company not subject to consolidated supervision by the Federal Reserve Board.[7]

In some cases, ILCs may be captive to their parent companies and rely entirely on that relationship for their viability. The proposal focuses specifically on these ILC arrangements. It sets forth additional criteria that the FDIC would consider when assessing the risks presented to an industrial bank by its parent organization and evaluating its ability to function independently of the parent organization. The proposal also would expand the application of the existing regulations to include scenarios where the parent company would control an industrial bank as a result of a conversion of an institution from a Federal savings association to an industrial bank. The FDIC also proposes to expand application of the regulation to those instances in which a parent company of an industrial bank is subject to a change of control or a merger in which it is the resultant entity. Finally, the FDIC proposes giving itself the regulatory authority to apply part 354 to other situations where an industrial bank would become a subsidiary of a company that is not subject to Federal consolidated supervision.

We appreciate and support the FDIC's proposal to address risks presented by captive ILC arrangements and to expand the application of its existing regulations to additional scenarios involving ILCs and their parent companies. Accordingly, we support finalization of the proposal.

We also encourage the FDIC to take further steps to mitigate the most significant risks posed by ILC arrangements: their ability to mix banking and commerce, the absence of a comprehensive, robust regulatory framework applicable to ILC parent companies comparable to that which applies to bank holding companies, and the lack of consolidated supervision of ILC organizations. Below, we reiterate many of the recommendations we made in our letter to the FDIC in 2020, attached as Appendix A.[8] These recommendations would help ensure that ILC arrangements are subject to the same requirements as other banking organizations.

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[5] 12 U.S.C. 1841(c)(2)(H) ("The term "bank" does not include […] [a]n industrial loan company, industrial bank, or other similar institution[.]")

[6] 12 U.S.C. 1843(k)(4)(F). BPI has long recognized that parents of ILCs that are subject to consolidated supervision by the Federal Reserve do not pose additional risks to the system and need not be included in any limitation on ILC parent companies. These include both bank holding companies and foreign banking organizations with operations in the United States that are already regulated as bank holding companies under the International Banking Act.

[7] *See* supra note 3.

[8] *See supra* note 4.

I. The FDIC Should Adopt the Proposal to Close Loopholes in the Current Regulatory Framework and Limit the Risks of Shell or Captive ILC Arrangements.

The proposal would ensure certain ILCs do not avoid the current regulatory framework due to a particular method of acquisition or creation and limit approval when ILCs are overly dependent on their parent company. These provisions would benefit the safety and soundness of the U.S. banking system and should be finalized.

The proposal contemplates closing loopholes in the current set of regulations governing ILCs.[9] The proposal would now apply the regulations governing ILCs[10] to instances in which an industrial bank is converted from a federal savings association charter pursuant to Sec. 5(i)(5) of the Home Owners' Loan Act, when there is a change in control or there is a merger where the parent company is the resultant entity, and any other situation where an industrial bank would become the subsidiary of a company not subject to federal consolidated supervision.[11] ILCs present similar risks regardless of their method of creation or acquisition, and the proposal would rightfully ensure that the current regulatory framework applies to ILCs and their parent companies in a consistent fashion.

Additionally, the proposal includes a rebuttable presumption weighing against approval for applications for ILCs that cannot function independently of, are materially reliant on, or serve only as a funding channel for their parent.[12] The proposal refers to these entities as "shell or captive" ILCs.[13] The FDIC is justifiably concerned that parent company turmoil could disrupt the operation of a subsidiary ILC, observing that a shell or captive ILC's "operations and condition may be vulnerable to any financial distress or operational disruptions at the parent company or any affiliates that provide key services to the industrial bank."[14] The FDIC further asserts that the "captive model creates material concerns about the viability of the industrial bank's proposed business model on a standalone basis and the industrial bank's franchise value in the event the parent organization experiences financial difficulty or failure."[15] The rebuttable assumption against approving shell or captive ILCs, alongside other elements of the proposal, would help guard against these risks.

II. The FDIC Should Petition Congress to Remove the Bank Holding Company Act Exemption for Industrial Banks and Loan Companies

The proposal's concern for parent company risk is correct but incomplete. An ILC parent company's "financial distress or operational disruptions" can negatively affect *any* ILC and thereby pose a risk to the Deposit Insurance Fund and to the banking system more broadly. Exemption from the requirements of

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[9] *See* amended 12 C.F.R. 354.2 at 89 Fed. Reg. 65,567–68.

[10] *See* 12 C.F.R. 354.

[11] *Id.*

[12] *See* amended 12 C.F.R. 354.6 at 89 Fed. Reg. 65,568.

[13] 89 Fed. Reg. 65,551.

[14] 89 Fed. Reg. 65,557.

[15] 89 Fed. Reg. 65,561.

the BHCA[16] means that ILC parents avoid regulation and supervision by the Federal Reserve and need not confine their activities to those "closely related to banking" as required for bank holding companies.[17]

If blending banking and commerce is too risky for a bank holding company, it is too risky for an ILC parent. The same activity bearing the same risk should be subject to the same requirements addressing that risk. Therefore, as in 2020, we urge the FDIC to petition Congress to remove the ILC exemption from the BHCA.

The FDIC and the Federal Reserve have previously noted that the profile of ILCs has changed dramatically since the Competitive Equality in Banking Act created the exemption in 1987. At the end of that year, the average aggregate ILC assets were $40 million.[18] According to the proposal, today that number is more than $10 billion,[19] which is more than *ninety times* the assets in the late 1980s when adjusted for inflation.[20]

Expansions in the powers granted to industrial banks and loan companies in state law, in the branches permitted under federal law, and in the reach of banking technology have accordingly led to expansions in ILC size. Working to close the existing loophole in the BHCA and bring ILCs and their parent companies within its scope is the best way for the FDIC to ensure that the risks they present are mitigated appropriately.

III. Until Congress addresses the Bank Holding Company Act exemption, the FDIC should issue a moratorium on processing licensing applications involving an industrial bank or loan company.

Congressional action to amend the BHCA will not be immediate. Therefore, we once again urge the FDIC to issue a new moratorium on processing applications involving an ILC with a parent not subject to consolidated supervision. A moratorium would permit the FDIC to heed the recommendation by Vice Chairman Travis Hill to engage in "a thoughtful, deliberative policymaking process to provide transparency around" the FDIC's approach that considers "a broader set" of questions and issues.[21] This moratorium would cover several related applications, including an application for a new entity, a change

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[16] *See supra* note 5.

[17] *See* supra note 6.

[18] *See* FDIC, *Moratorium on Deposit Insurance Applications and Change in Bank Control Notices Submitted By, or With Respect To, Industrial Loan Companies* (Aug. 1, 2006), 2, https://archive.fdic.gov/view/fdic/3151; *Testimony of Donald L. Kohn, Vice Chairman, Board of Governors of the Federal Reserve System, before the Committee on Financial Services, U.S. House of Representatives* (April 25, 2007), https://www.federalreserve.gov/newsevents/testimony/kohn20070425a.htm.

[19] 89 Fed. Reg. 65,558.

[20] In 2024, inflation has increased prices to only 2.77 times their 1987 levels. Federal Reserve Bank of Minneapolis, *Inflation Calculator*, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator (last accessed Oct. 10, 2024).

[21] Travis Hill, *Statement on the Notice of Proposed Rulemaking on Industrial Loan Companies*, FDIC (July 30, 2024), https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-industrial-loan.

in control notice, or a merger application involving an existing entity.[22] At the very least, the FDIC should not approve any ILC with a parent engaged in nonfinancial activities until the applicant can demonstrate that those activities are subject to bank-like prudential supervision sufficient to assess, and require mitigation of, risk to the DIF. This demonstration could be accomplished through bespoke written commitments and the FDIC's imposition of additional regulatory measures discussed below.

IV. The FDIC should adopt the provisions in the proposal and further strengthen the regulatory framework applicable to ILCs.

Parents of ILCs, their affiliates, and the ILCs themselves require the same level of regulation and supervision as other consolidated banking organizations offering functionally equivalent products and services. Therefore, the FDIC should finalize the current proposal and then propose a significantly expanded set of requirements analogous to those applicable to other insured banks and their parent and affiliates. As noted in our 2020 letter, the FDIC should:

- Strengthen commitments between the FDIC and ILC parents by directly codifying them as regulatory requirements;
- Impose periodic reporting requirements that are comparable to the reporting requirements that apply to bank holding companies and that are in addition to the annual reports required by the rule;
- Create consistency across the banking system by using the definition of "control" in the BHCA instead of the Change in Bank Control Act;
- Establish comparable requirements to other banking organizations, including:
    - Consolidated capital and liquidity requirements that take account of ILC-specific issues;

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[22] In implementing its 2006 moratorium on processing ILC applications, the FDIC cited *Western Coal Traffic League v. Surface Transportation Board*, 216 F.3d 1168, 1173 (D.C. Cir. 2000). *See* Sandra Thompson, *Memo to FDIC Board of Directors on Moratorium on Deposit Insurance Applications and Change in Bank Control Notices Submitted By, OR With Respect To, Industrial Loan Companies*, p. 4, https://www.fdic.gov/news/board-matters/2006/2006-07-28-notational-mem.pdf. The Court in *Western Coal* upheld the Surface Transportation Board's 15-month "moratorium" on the filing of railroad merger applications. The court evaluated the challenge to the Board's moratorium under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984). The court found that: (1) the Board had the statutory authority to impose a moratorium, and (2) the imposition of a moratorium was not arbitrary and capricious. While *Chevron* has since been overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), the *Western Coal* court also observed that there are "numerous cases upholding agency decisions to defer actions mandated by statute […] where doing so is administratively necessary in order to realize the broader goals of the same statute. 216 F.3d at 1173. All but one of the cases the *Western Coal* court described for upholding this principle were decided before the 1984 *Chevron* decision. *See id.* at 1172–1173 ("*Permian Basin Area Rate Cases*, 390 U.S. 747, 777–81 (1968) (approving moratorium on rate proceedings under § 4(d) of Natural Gas Act); […] *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 769–76 (3d Cir. 1979) (upholding two-year suspension of pending rulemaking and related licensing proceedings); *Krueger v. Morton*, 539 F.2d 235, 239–40 (D.C .Cir. 1976) (upholding "pause" in issuance of coal permits as not abuse of discretion); Kessler v. FCC, 326 F.2d 673, 679–85, (D.C. Cir. 1963) (upholding "freeze" upon acceptance of applications pending adoption of new rules).") Additionally, in implementing its 2006 moratorium, the FDIC noted that "[c]hallenges to agency moratoriums by applicants have been uniformly unsuccessful where the agency imposed the moratorium to evaluate its understanding of emerging issues and standards for dealing with those issues." *See* supra note [8] at 4. Thus, courts have upheld moratoriums on various agency actions for reasons other than deference to agency action as articulated in *Chevron*. Therefore, the FDIC would be on sound legal footing to implement another moratorium while it engages in a broader effort to address the risks presented by the ILC framework.

    - Financial privacy and information security requirements that comply with the Gramm-Leach-Bliley Act and Federal Financial Institutions Examination Council requirements;
    - An affiliate transaction monitoring program; and
    - Enhanced prudential standards for ILC parents with $100 billion or more in assets.
- Require ILC parents to acknowledge and consent to the visitorial powers of the FDIC and subject them to mandatory on-site and off-site examinations at least annually with requirements analogous to those of bank holding companies, including covering enterprise-wide risk management, information security, the Volcker Rule compliance, and compliance with 23A and 23B of the Federal Reserve Act;
- Establish minimum standards related to ILC parents' commercial activities, including:
    - A requirement to disclose affiliates and portfolio companies;
    - A requirement to disclose an ILC parent's non-financial activities to the FDIC and demonstrate that non-financial activities do not have an adverse effect on the industrial bank;
    - A prohibition on a non-financial business line accounting for more than a maximum percentage of the parent's total assets or revenue (*e.g.,* 10 percent);
    - A rebuttable presumption of control analogous to the Federal Reserve's merchant banking rules for determining whether a company is an affiliate (if the ILC parent company controls more than 15 percent of the total equity of a company, that company would be presumed to be an affiliate of the ILC and therefore subject to the requirements in section 23A and 23B);
    - A requirement to obtain FDIC approval to engage in new non-financial activities or acquire a subsidiary engaged in non-financial activities; and
    - A prohibition on the parent, and any company of which the parent owns or controls more than 5 percent of such company's voting shares, assets, or ownership interests, from cross-marketing the products and services of the ILC and its subsidiaries, and vice versa.[23]

The FDIC also should consider any additional measures that would harmonize the treatment of ILCs and their parents with other banking organizations subject to federal consolidated supervision.

We support the FDIC's proposal to expand the applicability of current ILC regulations and to strengthen the FDIC's scrutiny of shell and captive ILCs, and we strongly encourage the FDIC to take further action to ensure that the risks posed by ILCs and their parents and affiliates are subject to the same supervisory and regulatory framework as all other banking organizations.

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[23] The FDIC states, "Where a proposal for an industrial bank is presumed to be a shell or captive institution under the presumptions in proposed § 354.6(c)(1), if the target market is such that the institution's products are only available to customers of an affiliated company or a narrow segment of the community, this would weigh heavily against favorably resolving the convenience and needs statutory factor." 89 Fed. Reg. 65,562. Consistent with this analysis, the FDIC should hold that cross-marketing activities also are contrary to the "convenience and needs" statutory factor, because cross-marketing is specifically designed to benefit the affiliates customers over the general community.

BPI appreciates the opportunity to respond to the proposal and looks forward to engaging with the FDIC on the topics and proposals discussed in this response. If you have any questions, please contact the undersigned by phone at (202) 589-2534 or by email at joshua.smith@bpi.com.

Respectfully submitted,

/s/ Joshua Smith

Joshua Smith
Vice President, Assistant General Counsel
Bank Policy Institute

APPENDIX A

June 30, 2020

Via Electronic Mail

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Parent Companies of Industrial Banks and Industrial Loan Companies (Docket ID RIN 3064-AF31)

Ladies and Gentlemen:

The Bank Policy Institute ("BPI")[1] appreciates the opportunity to comment on the proposal by the Federal Deposit Insurance Corporation (the "FDIC") relating to the parent companies of industrial banks and industrial loan companies (the "Proposal").[2]

ILCs introduce unique risks to the banking system and the Deposit Insurance Fund because their parent companies are not required, due to a statutory loophole in the Bank Holding Company Act (the "BHCA"), to be subject to the same consolidated federal supervision and regulation framework or activity restrictions as bank holding companies and savings and loan holding companies,[3] even though ILCs offer banking products and services that are functionally indistinguishable from those offered by commercial banks. This statutory loophole allows these ILC parent companies to engage in commercial activities with few regulatory safeguards and only limited supervisory oversight.[4] That being said, it is important to note that these concerns do not apply to an ILC

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 85 Fed. Reg. 17,771 (Mar. 31, 2020). In this letter, we refer to industrial banks and industrial loan companies as "ILCs."

3 For purposes of this letter, we refer, for convenience, to bank holding companies and savings and loan holding companies collectively as "bank holding companies."

4 The Proposal would permit acquisitions of ILCs by commercial firms, which represents a complete reversal of an FDIC policy in place for nearly 14 years. Specifically, the FDIC imposed a moratorium on the acquisition of ILCs by commercial firms in 2006, and extended (and expanded) the moratorium in 2007. In doing so, the agency cited to a number of risks and public policy concerns as the supporting rationale. The Proposal does not discuss the support for FDIC's decision to reverse this policy, which raises concerns about whether the FDIC is meeting its statutory obligations under the Administrative Procedure Act. A noted

that is or becomes controlled by a parent company that is subject to federal consolidated supervision by the Board of Governors of the Federal Reserve System (the "Federal Reserve"). For this reason, BPI supports the Proposal's exclusion of ILC parent companies that are subject to consolidated supervision by the Federal Reserve. These include both bank holding companies and foreign banking organizations that are regulated as bank holding companies under the International Banking Act due to their operations in the United States.[5]

Because of the risks that ILCs and ILC parent companies pose to the banking system and the Deposit Insurance Fund, BPI encourages the FDIC to petition Congress to close the statutory loophole in the BHCA that permits ILCs to be controlled by commercial companies and other companies that are not subject to consolidated supervision by the Federal Reserve.[6] While more effective regulation by the FDIC can help mitigate in part the risk that ILCs and their parent companies pose to the Deposit Insurance Fund, legislative action to close this loophole is necessary if the risks from ILC parent companies are to be effectively mitigated in whole. Moreover, Congress should so act in order to maintain the historical separation of banking and commerce in U.S. law. As Chairman McWilliams has acknowledged, "[q]uestions about the mixing of banking and commerce, and the ability of banks to affiliate with nonfinancial firms, involve complicated policy trade-offs that are best addressed by Congress."[7] Past efforts by large commercial firms, such as Wal-Mart and Home Depot, to acquire FDIC-insured ILCs have raised significant concern and alarm, and the FDIC's Proposal would not prevent such firms, or large technology companies such as Rakuten, Facebook, or Amazon, from acquiring FDIC-insured ILCs.

As the FDIC itself acknowledged in the Proposal, and as the Federal Reserve has noted on several occasions,[8] the ILC industry has changed dramatically since 1987 when the statutory loophole was created as part of the Competitive Equality in Banking Act ("CEBA"). At that time, the size, nature, and powers of ILCs were limited. ILCs were first established in the early 1900s to make small loans to industrial workers and, until recently, were not

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academic recently asserted that because of the Proposal's failure to provide the "factual, legal, and policy basis for the FDIC's current decision to consider and approve acquisitions of ILCs by commercial firms . . . [the Proposal] is unlawful and invalid under the public notice requirement of the Administrative Procedure Act." Arthur E. Wilmarth, Jr., *The FDIC Should Not Allow Commercial Firms to Acquire Industrial Banks*, 39 Banking & Financial Services Policy Report No. 5 (May 2020). In order to fully assess these concerns, BPI recently submitted to the FDIC a request under the Freedom of Information Act ("FOIA") for this portion of the administrative record relating to the Proposal. As of the date of this letter, that request remains pending. We therefore kindly reserve the right to submit a supplemental comment letter addressing any Administrative Procedure Act concerns once we are able to review information provided in response to our FOIA request.

5 While foreign banks generally are regulated as bank holding companies under the International Banking Act due to their operations in the United States, a foreign bank without operations in the United States could exploit the statutory loophole to acquire an ILC even if the foreign bank is not subject to "comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the bank's home country" – the minimum standard that Congress has established for foreign bank entry into the banking business in the United States. *Compare* 12 U.S.C. §§ 1842(c)(3)(B), 1467a(e)(2)(D) (requiring the Federal Reserve to determine that a foreign bank meets this standard in connection with an application by the foreign bank to enter the banking business in the United States) *with* 12 U.S.C. § 1817(j) (requiring no such finding for the FDIC to approve an application by a foreign bank to establish or acquire control of an ILC).

6 *See* 12 U.S.C. § 1841(c)(2)(H) (excluding from the definition of "bank" for purposes of the BHCA an industrial loan company, industrial bank, or similar institution, provided certain requirements are met).

7 Statement by FDIC Chairman Jelena McWilliams on the Notice of Proposed Rulemaking: Parent companies of industrial banks and industrial loan companies (Mar. 17, 2020), *available at* https://www.fdic.gov/news/news/speeches/spmar1720.html.

8 *See* Testimony of Donald L. Kohn, Vice Chairman, Board of Governors of the Federal Reserve System, before the Committee on Financial Services, U.S. House of Representatives (April 25, 2007), *available at* https://www.federalreserve.gov/newsevents/testimony/kohn20070425a.htm.

generally permitted to accept deposits or obtain deposit insurance. At the time of CEBA's enactment, most ILCs were small, locally owned institutions that had only limited deposit-taking and lending powers under state law. At the end of 1987, the largest ILC had assets of only approximately $410 million, and the average asset size of all ILCs was less than $45 million. The relevant states also were not actively chartering new ILCs. At the time CEBA was enacted, for example, Utah had only 11 state-chartered ILCs, and had a moratorium on the chartering of new ILCs. Moreover, interstate banking restrictions and technological limitations made it difficult for institutions chartered in a grandfathered state to operate a retail banking business regionally or nationally.

Today, however, the statutory loophole allows large national and international financial and commercial firms to acquire an ILC, which is an FDIC-insured depository institution, and gain access to the federal safety net available to insured depository institutions. Indeed, dramatic changes have occurred with ILCs that make them a particularly attractive avenue for firms to gain access to the federal safety net *without* being subject to the activity restrictions and prudential framework that Congress established for the corporate owners of other full-service commercial banks. For example, in 1997, Utah lifted its moratorium on the chartering of new ILCs, allowed ILCs to call themselves banks, and authorized ILCs to exercise virtually all of the powers of state-chartered commercial banks. Since that time, Utah also has begun to charter new ILCs and to promote the ILC charter as a method for companies to acquire an insured depository institution while avoiding the requirements of consolidated federal supervision and regulation under the BHCA. In addition, changes in both federal law and technology now allow an FDIC-insured ILC chartered in a grandfathered state to open branches and offer its products to consumers and businesses throughout the country. Thus, legislative action is necessary to close the statutory loophole and prevent large, commercial and technology firms from acquiring an ILC and taking advantage of the federal safety net – a scenario that was not possible or even envisioned at the time of CEBA's enactment.

Recognizing that legislative change will take time, BPI urges the FDIC to issue a moratorium on processing licensing applications involving an ILC (*e.g.*, an application for deposit insurance for a de novo ILC, a change in control notice involving an existing ILC, or a merger application involving an existing ILC). If the FDIC is unwilling to impose this moratorium, then, at a minimum, the FDIC should adopt a final rule that establishes requirements for ILC parent companies that are analogous to the consolidated federal supervision framework applicable to bank holding companies (as set forth in Part I.A, below). The remainder of this letter describes these and other issues in greater detail, and provides specific responses and recommendations for the questions and issues identified in the Proposal. Part I of this letter describes overall policy considerations with respect to ILCs and their parent companies, and recommends certain changes to the Proposal in accordance with these considerations, which should be implemented through notice and comment. Part II of this letter responds to specific provisions of the Proposal and questions raised by the FDIC in the Proposal.

I. The FDIC Should Establish Robust Regulatory Safeguards to Mitigate Risk from ILC Parent Companies

Although ILCs represent only a very small share of the total assets of insured depository institutions,[9] ILCs have been the subject of heightened criticism and congressional and regulatory scrutiny due to concerns about their

[9] As the Proposal notes, as of December 31, 2019, ILCs accounted for approximately 0.7 percent of all insured depository institutions, and less than 4.5 percent of the combined assets of FDIC-supervised institutions. *See* 85 Fed. Reg. at 17,780.

safety and soundness and heightened risks.[10] Historically, criticism of ILCs has focused on the charter's mixing of banking and commerce through the statutory loophole that permits commercial companies to own ILCs without becoming bank holding companies under the BHCA. Because of this loophole, ILCs and their parent companies are not subject to the consolidated federal supervision that applies to commercial banks and their bank holding companies. Some of the most significant differences between the supervisory frameworks applicable to bank holding companies and ILC parent companies are summarized in the Appendix to this letter.

Recently, the growth of fintech and increasing interest among technology companies in the banking sector have created greater interest in the ILC charter. In addition, the FDIC has started to approve applications for deposit insurance for de novo ILCs after a long hiatus,[11] and the FDIC's Proposal suggests that the FDIC intends to continue accepting and evaluating applications for deposit insurance from de novo ILCs.

The risks inherent in the ILC charter – and the potential growth in charters due to the FDIC's view that it has a responsibility to accept and review ILC applications – warrant a robust rule establishing regulatory safeguards to mitigate risk from ILC parent companies. As such, the final rule should establish supervisory requirements applicable to ILCs and their parent companies that are comparable to the supervisory requirements that apply to bank holding companies. The final rule should also authorize the FDIC to supplement and augment these baseline requirements on a case-by-case basis, based on risk factors such as the ILC and ILC parent company's size and business model.

While these guiding principles should apply to all aspects of the ILC regulatory framework, we highlight five areas of particular importance for purposes of the Proposal: supervision of ILC parent companies, non-financial activities, capital and liquidity, privacy and data protection requirements, and the definition of "control."

A. FDIC Supervision of Covered Companies Should be Comparable to Federal Reserve Supervision of Bank Holding Companies

As the Proposal notes, the FDIC has the statutory authority to examine any affiliate of an ILC, including the ILC's parent company, as may be necessary to disclose fully the relationship between the ILC and its affiliate, as well as the effect of such relationship on the ILC.[12] In addition, the parent company of an ILC is required to serve as a source of financial strength for an ILC.[13] However, the FDIC has not developed a consolidated supervision framework that is analogous to the Federal Reserve's consolidated supervision program for bank holding companies and their subsidiaries.[14] In addition, the FDIC does not have the authority to examine a Covered Company or non-bank subsidiary thereof for compliance with applicable laws or regulations, or to determine whether the Covered Company or subsidiary is engaged in an unsafe or unsound banking practice. Further, the FDIC is not authorized to

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10 For example, the Dodd-Frank Act imposed a three-year moratorium on the FDIC's approval of deposit insurance applications for ILCs owned by commercial firms. *See* Pub. L. 111-203 § 603(a); *see also* FDIC, Moratorium on certain Industrial Loan Company Applications and Notices, 71 Fed. Reg. 43,482 (Aug. 1, 2006).

11 *See* FDIC, Approval Order for Deposit Insurance of Square Financial Services, Inc., Salt Lake City, Utah (March 17, 2020); FDIC, Approval Order of Deposit Insurance of Nelnet Bank, Salt Lake City, Utah (March 17, 2020).

12 *See* 12 U.S.C. § 1820(b)(4).

13 *See* 12 U.S.C. § 1831o-1(b).

14 *See, e.g.,* Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations, S.R. 08–9 (Oct. 16, 2008).

take enforcement actions against such companies on these grounds, except to the extent they are institution-affiliated parties of an ILC pursuant to the FDIC's authority under section 8 of the Federal Deposit Insurance Act (the "FDI Act"). Instead, the FDIC's authority over ILC parent companies historically has been contractual – i.e., the FDIC requires such parent companies to enter into capital and liquidity maintenance agreements ("CALMAs") and other agreements with ILCs and the FDIC as a condition of the FDIC's approval of deposit insurance coverage and merger applications, or non-objections to changes in control. Through such agreements, the ILC parent company agrees to various prudential conditions, and contractually consents to be subject to the FDIC's enforcement powers under the FDI Act. The Proposal would formalize the CALMA process by requiring parent companies of ILCs subject to the rule – called "Covered Companies" – to enter into written agreements that must contain eight specific commitments related to the Covered Company's relationship with its ILC subsidiary.

While some of the Proposal's eight commitments are analogous to the Federal Reserve's consolidated supervision of bank holding companies – for example, under the Proposal, a Covered Company must disclose its subsidiaries to the FDIC on an annual basis, consent to examination by the FDIC of itself and its subsidiaries, and submit an annual report of operations and activities to the FDIC – BPI believes that the Covered Company's commitments can and should be more robust.[15] Robust commitments would help mitigate the risks posed by the statutory loophole in current law. For example, a Covered Company with greater than $100 billion in assets should be subject to enhanced prudential standards that are analogous to those that apply to BHCs with greater than $100 billion in assets. In addition, BPI believes that these commitments should be codified in the final rule as directly applicable regulatory requirements,[16] and the FDIC should have the discretion to require enhanced commitments from a particular Covered Company in addition to the directly applicable regulatory requirements.

1. Reporting

Covered Companies should be subject to periodic reporting requirements that are comparable to the reporting requirements that apply to bank holding companies and that are in addition to the annual reports that would be required under the Proposal.

2. Examinations

Covered Companies should acknowledge and consent to the visitorial powers of the FDIC to conduct on-site and off-site examinations of the Covered Company and its subsidiaries. The final rule should establish a mandatory examination schedule of at least one examination per year for Covered Companies, and prescribe a list of examination topics that is comparable to the examination requirements of similarly situated bank holding companies.[17] Examination areas should, among many areas, include in particular:

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[15] We note that Questions 8 through 10 of the Proposal relate to the examination and supervision of the Covered Company and its non-ILC subsidiaries.

[16] While BPI does not support the FDIC retaining the discretion to waive these required commitments, to the extent the FDIC does retain such discretion in the final rule, BPI believes that the final rule should at least codify the decision factors that the FDIC will consider in granting such waivers.

[17] BPI recognizes that the supervisory program applicable to bank holding companies is tailored based on the size and complexity of the bank holding company. BPI recommends that the FDIC take a similar tailoring approach with respect to ILC parent companies.

- An enterprise-wide risk management and risk governance framework that requires board of directors oversight, a broad risk assessment, and implementation of risk controls;
- An information security program that complies with the safeguards rule under the Gramm-Leach-Bliley Act ("GLBA") and Federal Financial Institutions Examination Council ("FFIEC") IT requirements; and
- An enterprise-wide review for compliance with the Volcker Rule across a Covered Company's U.S. and non-U.S. operations.[18]

3. Affiliate Transactions

Finally, given the risk that non-financial activities pose to the ILC subsidiary and the Deposit Insurance Fund, covered transactions as defined in sections 23A and 23B of the Federal Reserve Act between a Covered Company (and its non-ILC affiliates) and the ILC subsidiary are a cause for particular concern. The FDIC's examination of Covered Companies should include a review for compliance with the section 23A and 23B restrictions, which are essential for ensuring that the various benefits afforded the ILC as an FDIC-insured depository institution are not transferred to the Covered Company. Transfer of these benefits would place the Deposit Insurance Fund and ILC at significantly greater risk because the Covered Company is not subject to consolidated supervision. In addition, to ensure the safety and soundness of the ILC, the FDIC should require the Covered Company to have an affiliate transaction monitoring program that includes heightened processes for identifying and appropriately limiting covered transactions between the ILC and Covered Company or ILC and other affiliates.

If a Covered Company is engaged in non-financial activities, the FDIC also should establish a rebuttable presumption of control analogous to the Federal Reserve's merchant banking rules for determining whether a company is an "affiliate" of the Covered Company for purposes of sections 23A and 23B. Specifically, if the Covered Company controls more than 15 percent of the total equity of the company, that company would be presumed to be an affiliate of the ILC and therefore subject to the requirements in section 23A and 23B.[19]

B. The FDIC Should Impose Conditions and Constraints on Non-Financial Activities of Covered Companies

The key feature that distinguishes the ILC charter from the commercial bank charter is the ability of the ILC parent company to engage in unlimited non-financial activities. The ability of Covered Companies to engage in commercial activities represents a significant risk to the ILC and to the Deposit Insurance Fund. Through its parent company, the ILC may be exposed to the commercial risks of the parent company's industry. The Proposal would not impose activity restrictions on Covered Companies.[20]

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[18] The Volcker Rule in section 619 of the Dodd-Frank Act and regulations promulgated by various federal agencies, including the FDIC, applies to a Covered Company under the FDIC's Proposal, subject to amendments to the rule made by the Economic Growth, Regulatory Relief, and Consumer Protection Act for certain small depository institutions.

[19] *See* 12 C.F.R. § 225.176(b)(1).

[20] We note that Questions 5 and 20 of the Proposal relate to the permissible activities of the ILC parent company. In response to Question 5, BPI does not favor requiring Covered Companies to conduct their financial activities through an intermediate holding company.

As discussed above, BPI believes that Congress and the FDIC should act to close the statutory loophole that permits ILC parent companies to engage in non-financial activities. This ability to engage in non-financial activities also gives ILCs and their parent companies a distinct advantage over other charter types. In particular, ILCs and their parent companies may have commercial or mixed business models that generate revenues from activities that are impermissible for commercial banks and bank holding companies, and access to such revenues by commercially controlled ILCs disadvantages commercial banks and bank holding companies that provide credit more broadly to the U.S. economy.

Even in the absence of action from Congress or the FDIC that would prohibit ILC parent companies from engaging in non-financial activities, the FDIC should exercise its authority over the commercial activities of ILC parent companies to the extent that these activities could impact the safety and soundness of the ILC subsidiary. For this reason, BPI recommends that the final rule, at a minimum, incorporate minimum standards and requirements related to the activities of Covered Companies that would support the safety and soundness of the subsidiary ILC and facilitate the FDIC's oversight. For example, the final rule should:

- Require a Covered Company to disclose its affiliates and portfolio companies to the FDIC;
- Require a Covered Company to disclose its non-financial activities to the FDIC and to demonstrate that such activities do not have an adverse effect on the ILC;
- Establish concentration limits that would prohibit a Covered Company from having a non-financial business line that accounts for more than a maximum percentage (*e.g.*, 10 percent) of the Covered Company's total assets or revenues; and
- Require a Covered Company to obtain FDIC approval to acquire a subsidiary engaged in non-financial activities or to engage in new non-financial activities, which would prompt the FDIC's review of the adequacy of the Covered Company's CALMA in light of the new non-financial activities and their risk to the ILC.

C. Covered Companies Should be Subject to Minimum Capital and Liquidity Requirements by Rule[21]

As state nonmember FDIC-insured banks, ILCs are subject to the regulation and supervision of the FDIC,[22] including the FDIC's minimum capital and liquidity requirements,[23] and the FDI Act's prompt corrective action regime.[24] However, the FDIC does not impose capital and liquidity requirements on the ILC parent company on an entity or consolidated basis. The Proposal would require Covered Companies to "maintain the capital and liquidity of the subsidiary [ILC] at such levels as the FDIC deems appropriate,"[25] but there would be no capital and liquidity requirements imposed on the Covered Company itself.

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[21] We note that Question 14 of the Proposal relates to capital requirements applicable to Covered Companies.

[22] *See* 12 U.S.C. § 1813(q) (definition of "appropriate federal banking agency").

[23] *See generally* 12 C.F.R. Parts 324 and 329.

[24] *See generally* 12 C.F.R. Part 324, Subpart H.

[25] 85 Fed. Reg. at 17,786 (proposed regulation 12 C.F.R. § 354.4(a)(7)).

ILCs and their parent companies and affiliates should be subject to consolidated capital requirements that are comparable to those that apply to their commercial bank and bank holding company counterparts. To this end, BPI recommends that the final rule should establish minimum capital and liquidity requirements that would apply on a consolidated basis to the Covered Company and its subsidiaries.[26] BPI also recommends that the final rule should establish minimum capital and liquidity requirements tailored specifically to ILCs, and such requirements should be greater than the requirements applicable to other FDIC-insured depository institutions due to the enhanced risk of the Covered Company on the ILC and the Deposit Insurance Fund.

The FDIC also should continue to have the authority to increase the requirements that apply to particular ILCs in the CALMA and other agreements to be entered into by the Covered Company, ILC, and FDIC if warranted by the particular risks (*e.g.*, risks from the business activities of the Covered Company or other factors).[27]

D. Covered Companies Should Comply with Privacy and Data Protection Requirements

ILCs that are engaged in providing financial products and services to consumers are subject to regulations restricting the disclosure of consumers' non-public personal information to non-affiliated third parties,[28] and to interagency standards regarding information security.[29] Similar regulations apply to commercial banks.[30] Likewise, bank holding companies and their non-bank subsidiaries are subject to the same financial privacy requirements and the interagency information security standards,[31] among other consumer privacy and information security requirements. However, ILC parent companies are not subject to the same information security requirements because they are not covered by the GLBA safeguards rule as interpreted and enforced by the FFIEC, and their non-financial activities likewise would not be subject to the same financial privacy requirements in the GLBA financial privacy regulation, Regulation P. The absence of enterprise-wide privacy and information security requirements creates risk for ILC customers, whether or not they also obtain products and services from a Covered Company. The final rule should require Covered Companies to comply with financial privacy and information security requirements across all of their financial and non-financial affiliates and activities.

More specifically, applying financial privacy and information security requirements to ILC parent companies and all of their activities would help address a significant criticism of the ILC charter. Covered Companies' ownership of ILCs presents unique concerns about the usage of consumer financial data for commercial purposes,

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26 One possibility for implementing consolidated capital and liquidity rules would be to require Covered Companies to prepare a balance sheet that disregards their non-financial activities. The final rule's capital and liquidity rules could then be applied only to the financial activities of the consolidated entity.

27 The FDIC recently exercised this authority to impose a 20 percent leverage ratio requirement on Square Financial Services, Inc., *see* FDIC, Approval Order for Deposit Insurance of Square Financial Services, Inc., Salt Lake City, Utah (March 17, 2020), and a 12 percent leverage ratio requirement on Nelnet Bank, *see* FDIC, Approval Order for Deposit Insurance of Nelnet Bank, Salt Lake City, Utah (March 17, 2020). These leverage ratio requirements are a significant increase from the minimum leverage ratio of 4 percent applicable to other FDIC-supervised institutions and the 8 percent leverage ratio expected of de novo FDIC-insured institutions. *See* 12 C.F.R. § 324.10(a)(iv); FDIC, Applying for Deposit Insurance: A Handbook for Organizers of De Novo Institutions, p. 19 (Dec. 2019).

28 *See* 12 C.F.R. Parts 332 and 1016.

29 *See* 12 C.F.R. Part 364, Appendix B.

30 *See, e.g.,* 12 C.F.R. Part 30, Appendix B (interagency information security standards applicable to national banks); *id.* Part 208, Appendix D-2 (interagency information security standards applicable to state member banks).

31 *See* 12 C.F.R. Part 225, Appendix F.

and these same concerns are not presented by a company subject to consolidated federal supervision because such a company would be subject to information security standards and financial privacy requirements. The heightened interest of technology companies (including large, integrated technology companies with access to large volumes of online consumer data) in potentially using the ILC charter amplifies this concern. For this reason, in addition to applying existing financial privacy and information security requirements to Covered Companies in the final rule, the FDIC should consider other safeguards specific to ILCs and their parent companies regarding the protection and use of consumer financial data for commercial purposes. For example, a Covered Company should be required to develop and implement an information security program that complies with the safeguards rule under the GLBA and FFIEC IT requirements.

Separate and apart from financial privacy and information security requirements discussed above, a Covered Company engaged in non-financial activities, and any company of which the Covered Company owns or controls more than 5 percent of such company's voting shares, assets, or ownership interests, should be prohibited from cross-marketing the products and services of the ILC and its subsidiaries, and vice versa. This restriction would be consistent with the regulations applicable to financial holding companies under the Federal Reserve's merchant banking rules, which allow financial holding companies to make investments in companies that are not engaged in financial activities ("portfolio companies").[32] Specifically, a financial holding company may not offer or market, directly or indirectly through any arrangement, any product or service of a portfolio company held by the financial holding company under the merchant banking rules, and vice versa.

E. The Final Rule Should Use the BHCA Definition of "Control," Rather than the Definition in the CIBCA

The Proposal would use the definition of "control" in the Change in Bank Control Act (the "CIBCA") and FDIC's implementing regulations to determine whether a company controls an ILC and is therefore a Covered Company.[33] By contrast, commercial banks and their bank holding companies are subject to the definition of "control" in the BHCA,[34] including the Federal Reserve's recently promulgated regulation on this topic.[35]

For consistency, BPI recommends that the final rule replace the CIBCA definition of "control" with the BHCA definition of "control," and incorporate by reference the Federal Reserve's recent rulemaking on the BHCA definition of "control." This approach has a recent legislative analogue. In the Dodd-Frank Act, Congress directed the FDIC to require ILC parent companies to serve as a source of financial strength for the subsidiary ILC,[36] and in doing so, adopted the BHCA definition of "control" for consistency.[37] To determine controlling shareholders, as discussed further in section II.B, the FDIC should continue to use the CIBCA definition of "control."

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[32] *See* 12 C.F.R. § 225.176(a).

[33] *See* 85 Fed. Reg. 17,785 (proposed regulation 12 C.F.R. § 354.2).

[34] *See* 12 U.S.C. § 1841(a)(2).

[35] *See* Federal Reserve, Control and Divestiture Proceedings, 85 Fed. Reg. 12,398 (Mar. 2, 2020) (to be codified at 12 C.F.R. § 225.31 and elsewhere).

[36] *See* 12 U.S.C. § 1831o-1(b).

[37] *See* 12 U.S.C. 1813(w)(5) (incorporating 12 U.S.C. § 1841).

II. Comments on Specific Provisions in the Proposed Rule

A. Scope of the Proposal

Question 1: Should the proposed rule apply only prospectively, that is, to industrial banks that become a subsidiary of a parent company that is a Covered Company? Or should the proposed rule also apply to all industrial banks that, as of the effective date, are a subsidiary of a parent that is not subject to Federal consolidated supervision by the FRB? What are the concerns with each approach?

The final rule should apply to an ILC parent company and its ILC subsidiary if the parent company becomes a Covered Company after March 13, 2020, which was the date of the Government in the Sunshine Act notice announcing the FDIC Board meeting at which the Proposal was approved.[38] Given the relatively limited number of active ILCs prior to the release of the Proposal, BPI does not oppose the grandfathering of ILCs that were subsidiaries of ILC parent companies prior to March 13, 2020 ("grandfathered ILCs"). However, consistent with the Proposal, grandfathered ILCs that undergo certain fundamental changes, such as a merger, change in control, or grant of deposit insurance, after March 13, 2020 should become subject to the final rule. In addition, BPI recommends that the final rule apply to grandfathered ILCs that undergo certain other changes, such as when the ILC parent company acquires a subsidiary engaged in non-financial activities, or the ILC parent company engages in new non-financial activities.

Finally, BPI recommends that the definitions of "Control" and "Covered Company" should be clarified to ensure that a grandfathered ILC and ILC parent company will not remain grandfathered if there is a change in control of the ILC parent company effected through a reverse triangular merger or some other transaction that does not require filing of a change in bank control notice under section 7(j) of the FDI Act.

B. ILCs Without Parent Companies

Question 2: Should the proposed rule apply to industrial banks that do not have a parent company? How should the rule be applied in such a case?

Question 3: Should the proposed rule apply to industrial banks that are controlled by an individual rather than a company?

Question 4: If an individual controls the parent company of an industrial bank, should the individual be responsible for the maintenance of the industrial bank's capital and liquidity at or above FDIC-specified levels? Should an individual who controls a parent company be responsible for causing the parent company to comply with the written agreements, commitments, and restrictions imposed on the industrial bank? How should the rule be applied in such a case?

BPI is primarily focused on ensuring that ILC parent companies are subject to comparable consolidated federal supervision as bank holding companies. Because ILCs themselves are subject to the same regulatory treatment as state nonmember banks, BPI does not feel it is necessary to impose these forms of regulation on ILCs without parent companies just as they are not imposed on other FDIC-insured banks without parent companies. BPI

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[38] *See* 85 Fed. Reg. 14,679 (Mar. 13, 2020).

supports the FDIC's current approach of imposing certain conditions at the level of the ILC's or Covered Company's controlling shareholders as necessary to ensure the safety and soundness of the ILC.[39]

C. Cure Periods for Non-Compliance with Commitments

Question 13: Some of the provisions include continuing commitments, such as to maintain capital. Should the proposed rule include a cure period in the event that the industrial bank or its parent company initially comply with these commitments, but later fall out of compliance? If so, should such a cure period be provided for all commitments or certain commitments (please specify)? Alternatively, should the FDIC rely on its enforcement authorities under sections 8 and 50 of the FDI Act to take action as appropriate?

BPI believes that the FDIC can rely on its existing enforcement powers, including under sections 8 and 50 of the FDI Act, to take appropriate action if a Covered Company violates any of the Proposal's commitments. Because the FDIC retains the discretion to initiate a public enforcement action or address issues informally through a nonpublic enforcement action or the supervisory process, BPI does not believe that a regulatory grace period is necessary.

D. Temporal Limitations

Question 16: Should any of the restrictions in § 354.5 be temporally limited, for example, to the first three years after becoming a subsidiary of such Covered Company?

Conditions imposed by the FDIC in connection with a de novo application for deposit insurance typically have a three-year duration. Consistent with BPI's focus on ensuring effective supervision of the ILC parent company, BPI believes that the restrictions on Covered Companies that are intended to mimic the ongoing requirements applicable to commercial banks and bank holding companies (e.g., FDIC prior approval for a new ILC board member) should be of perpetual duration. However, those restrictions that are not analogous to the ongoing requirements applicable to commercial banks and bank holding companies should apply for a duration of three years. After the initial three-year period, the FDIC may retain the discretion to extend such conditions, or otherwise impose new requirements using its enforcement powers.

E. Decision Criteria for Written Approvals

Under section 354.5 of the Proposal, an ILC controlled by a Covered Company would be prohibited from undertaking certain actions without the prior approval of the FDIC. As explained more fully below, BPI generally supports these important safeguards on the actions of a Covered Company with respect to an ILC subsidiary. Nevertheless, BPI also believes that, consistent with administrative law principles that require agencies to act in accordance with articulable standards, the FDIC should identify the decision criteria to be evaluated by the FDIC in determining whether to grant prior written approval for any of the restricted activities or changes in section 354.5 of the Proposal. Specifically, BPI believes that the final rule should provide that the FDIC shall not grant a prior

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[39] *See, e.g.,* FDIC, Approval Order for Deposit Insurance of Square Financial Services, Inc., Salt Lake City, Utah (March 17, 2020) (requiring the indirect controlling shareholder of the ILC, Jack Dorsey, to enter into a CALMA with the FDIC). We note that Question 12 of the Proposal relates to CALMAs involving dominant shareholders of a Covered Company.

approval under section 354.5, unless the FDIC has determined that the action in question would be in the best interests of the ILC subsidiary or the Deposit Insurance Fund.

Furthermore, as BPI reads the Proposal, the FDIC would not provide itself with the authority to waive the written agreement requirement of section 354.3 or to waive or modify the required elements of the written agreement set forth in section 354.4. BPI agrees that this is an appropriate limit on agency discretion. To the extent, however, the FDIC believes the Proposal would provide the FDIC with the discretion to waive or modify the written agreement requirement, BPI believes the final rule should condition the FDIC's ability to grant any such waiver or modification on the FDIC's determination that doing so would be in the best interests of the ILC subsidiary or the Deposit Insurance Fund.

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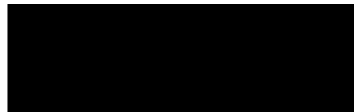
If you have any questions, please contact the undersigned by phone at 202-589-2424 or by email at dafina.stewart@bpi.com.

Respectfully submitted,



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Appendix

Comparison of BHC and ILC Parent Company Supervisory Frameworks

Supervisory Requirement	BHCs	ILC Parent Companies (as proposed)
Consolidated Federal Supervision	Yes	No
Visitorial Examination Powers and Defined Examination Schedule	Yes	Limited *Covered Companies (along with all subsidiaries) must consent to FDIC jurisdiction for limited-scope examinations*
Consolidated Capital and Liquidity Requirements	Yes	No *Capital and liquidity requirements apply to the ILC subsidiary only*
Restrictions on Non-Banking Activities	Yes	No *Covered Companies may engage in unlimited non-banking activities*
Reporting (*e.g.*, FR Y9-C)	Yes	Limited *Annual reporting would be required for:* *1. Financial condition;* *2. Systems for identifying, measuring, monitoring, and controlling financial and* *3. Operational risks;* *4. Transactions with depository institution subsidiaries of the Covered Company; and* *Compliance with applicable provisions of the FDIA and any other law or regulation*
Rigorous "Control" Standards	Yes	No *Covered Companies are subject to CIBCA control standards rather than BHCA standards*

Privacy	Yes	Depends *Covered Companies' non-financial products and services are not subject to privacy requirements*
Information Security examinations	Yes	No
Resolution Planning and Recovery Planning	Yes *Resolution planning requirements generally apply only to BHCs with $250 billion or more in total consolidated assets*	Limited *FDIC has the authority to require contingency planning*
Potential Divestiture Requirement if Subsidiary Becomes Undercapitalized and in Other Supervisory Scenarios	Yes	No
Incentive Compensation Requirements	Yes	No
New Activity Restrictions Based on CRA Rating	Yes *Activity restrictions apply to BHCs that are FHCs and have failed to maintain a satisfactory or better CRA rating*	No
Enhanced Prudential Standards for Large BHCs	Yes	No
Source of Strength Obligations	Yes	Yes
Volcker Rule Requirements	Yes	Yes